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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DENIS JAVIER MEJIA, Defendant and Appellant.	H046316 (Santa Clara County Super. Ct. No. C1354348)

A jury convicted defendant Denis Javier Mejia of eight counts of forcible lewd conduct against a child under the age of 14 years. The trial court sentenced defendant to an aggregate prison term of 56 years. That aggregate sentence included unauthorized terms on two of the counts because the trial court erroneously applied an outdated version of the governing statute. In 2017, this court affirmed the judgment of conviction but vacated defendant's sentence as unauthorized and remanded the matter for resentencing. On remand, the trial court sentenced defendant to a 60-year prison term. Defendant appeals, arguing that the increased sentence violates California's double jeopardy clause and the due process clause of the Fourteenth Amendment. We disagree and affirm.

I. BACKGROUND

We previously granted defendant's request for judicial notice of the record in his prior appeal (*People v. Mejia* (June 28, 2017, H041852) [nonpub. opn.].) We briefly summarize the facts regarding defendant's underlying convictions and prior proceedings. We take those facts from our prior opinion, where they are set forth more fully.

Defendant dated the victim's mother. He sexually abused the victim from age seven or eight until age 11. Defendant touched the victim's vagina with his hand, mouth, and penis as often as three or four times a week. In 2014, a jury convicted defendant of eight counts of lewd acts on a child under the age of 14 years by use of force, violence, duress, menace, or fear (Pen. Code, § 288, subd. (b)(1)).[1] Counts 1 and 2 involved conduct that occurred between November 24, 2009 and November 23, 2010; counts 3 and 4 involved conduct that occurred between November 24, 2010 and November 23, 2011; counts 5 through 8 involved conduct that occurred between November 24, 2011 and April 1, 2013.

In December 2014, the trial court imposed an aggregate prison sentence of 56 years, consisting of the middle term of six years on counts 1 through 4 and the middle term of eight years on counts 5 through 8, all running consecutively.

On appeal, this court concluded that the sentence was unauthorized because the trial court had applied the wrong version of section 288, subdivision (b)(1) in sentencing defendant on counts 3 and 4. As we explained then, between January 1, 2005 and September 8, 2010, violations of section 288, subdivision (b)(1) were punishable by imprisonment in the state prison for three, six, or eight years. (Stats. 2004, ch. 823, § 7, pp. 6294-6295.) Since September 9, 2010, violations of section 288, subdivision (b)(1) have been punishable by imprisonment in the state prison for five, eight, or 10 years. (Stats. 2010, ch. 219, § 7, pp. 1009-1010, eff. Sept. 9, 2010; *People v. Soto* (2011) 51 Cal.4th 229, 237, fn. 4.) The court improperly applied former section 288, subdivision (b)(1) to counts 3 and 4 (involving conduct that occurred between November 24, 2010 and November 23, 2011) and sentenced defendant to a middle term of six years on those counts. This court vacated the sentence and remanded for a new

[1] All statutory references are to the Penal Code unless otherwise stated.

sentencing hearing to allow the trial court to exercise its discretion in fashioning an aggregate sentence.

On remand, the trial court sentenced defendant to the middle term of six years on counts 1 and 2 and the middle term of eight years on counts 3 through 8, with all terms running consecutively, for a total term of 60 years. Defendant timely appealed.

II. DISCUSSION

A. Double Jeopardy

Defendant argues that while his initial 56-year sentence was structured in an unauthorized manner, a 56-year sentence could have been imposed lawfully. Specifically, he notes the court could have sentenced him to the middle term of six years on counts 1 and 2, the low term of five years on counts 3 and 4, the middle term of eight years on counts 5 through 7, and the upper term of 10 years on count 8, with all terms running consecutively, for a lawful aggregate term of 56 years. Defendant contends that, in these circumstances, the imposition of a higher sentence on remand violated California's double jeopardy clause.

1. Legal Principles

In *People v. Henderson* (1963) 60 Cal.2d 482, 497, our Supreme Court held that where a conviction is reversed on appeal and the defendant is convicted again on retrial, the California Constitution's double jeopardy clause prohibits the imposition of a more severe sentence following the second trial.[2] In *Henderson,* the defendant was convicted of first degree murder and sentenced to life imprisonment. His conviction was reversed on appeal. He was convicted again following a retrial and was sentenced to death. The high court held that the state's double jeopardy clause precluded the imposition of

[2] *Henderson* "is one instance where . . . the state double jeopardy clause [has been interpreted] more broadly than the federal clause." (*People v. Monge* (1997) 16 Cal.4th 826, 844.) The imposition of a more severe sentence following reversal and retrial does not violate the federal double jeopardy clause. (*Ibid.*)

the death penalty. The court analogized to cases holding "that a reversed conviction of a lesser degree of a crime precludes conviction of a higher degree on retrial," and reasoned that "whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different punishments for the same crime" should not dictate whether the double jeopardy clause applies. (*Ibid*.) The *Henderson* court further reasoned that "[a] defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." (*Ibid*.)

Henderson's "reasoning has not remained confined to the capital sentencing context." (*People v. Hanson* (2000) 23 Cal.4th 355, 359 (*Hanson*).) In *People v. Ali* (1967) 66 Cal.2d 277, 281, our Supreme Court held that, under *Henderson*, a defendant who originally was sentenced to concurrent terms could not be sentenced to consecutive terms for the same offenses on retrial. In *Hanson*, the high court applied the *Henderson* rule to a restitution fine. There, on appeal from the defendant's original conviction, the court of appeal had modified a special circumstance murder conviction to second degree murder; reversed and dismissed with prejudice the special circumstance finding; and remanded for resentencing only, not retrial. (*Hanson, supra*, 23 Cal.4th at pp. 357-359.) On remand, the trial court increased defendant's restitution fine by $9,000. (*Id*. at p. 357.) Our Supreme Court concluded that the imposition of a higher restitution fine on remand for resentencing violated state double jeopardy principles. (*Id*. at p. 363 ["one who appeals an erroneous conviction at the risk of a greater fine is indistinguishable from one who hazards a longer period of incarceration"].)

While the rule announced in *Henderson* has been construed broadly, it does not apply "when a trial court [has] pronounce[d] an unauthorized sentence. Such a sentence is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized

pronouncement." (*People v. Serrato* (1973) 9 Cal.3d 753, 764, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) "When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed *whenever the mistake is appropriately brought to the attention of the court*. [Citations]." (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693 (*Massengale*), italics added.) Because the correction of an unauthorized sentence is required even when a defendant does not appeal, such correction "is not a penalty imposed upon appellants because of their appeals. [It follows that t]he rationale of [*Henderson*], forbidding increased punishment after a reversal and second trial, does not apply." (*Ibid*.)

*2. Given This Court's Order to Vacate the Original Sentence as Unauthorized, **Henderson** did not Preclude the Trial Court From Imposing a More Severe Sentence on Remand*

The trial court initially sentenced defendant to six-year terms on counts 3 and 4 because it erroneously applied an outdated version of the governing statute. The applicable version of that statute provided for a term of five, eight, or 10 years. Because a six-year term "could not lawfully be imposed under any circumstance" on counts 3 and 4, those terms were unauthorized. (*People v. Scott* (1994) 9 Cal.4th 331, 354; see *People v. Superior Court* (*Duran*) (1978) 84 Cal.App.3d 480, 485-486 (*Duran*) ["it is clear that the trial court's sentencing error was in excess of its jurisdiction in that the court applied the wrong statute in sentencing the real party and that it acted wholly outside statutory authority"].)

Given that the original terms imposed on counts 3 and 4 were unauthorized, *Serrato* governs, not *Henderson*. Accordingly, the trial court was not barred from imposing a more severe sentence on remand. *Duran* is illustrative. There, the trial court sentenced the defendant to a term of 18 months for attempted robbery. (*Duran*, *supra*, 84 Cal.App.3d at p. 483.) In doing so, the trial court relied on the wrong statute. The

applicable statute provided for a term of 16 months, two years, or three years. (*Ibid*.) The People sought a writ of mandate to correct the sentence. The Fifth District Court of Appeal issued a writ of mandate directing the trial court to vacate the sentence and to resentence the defendant. (*Id*. at p. 490.) The Court of Appeal rejected the defendant's argument that, on remand, the double jeopardy clause compelled a sentence of 16 months (the only authorized sentence that would not be more severe than the original sentence). (*Id*. at p. 488.) The court reasoned that *Serrato* governed because the defendant "was sentenced to a term under the wrong statute . . . , [such that] the sentence was illegal and void and the trial court ha[d] authority to correct the unauthorized sentence and enter a proper judgment even though the sentence is more severe than the sentence originally imposed." (*Ibid*.) This case is on all fours with *Duran* and, like that court, we find no double jeopardy violation.

Defendant relies on *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 for his claim that the *Serrato* exception to the *Henderson* rule does not apply here because a 56-year sentence is theoretically possible. For the reasons explained below, we are not persuaded. In *Mustafaa*, the defendant "pleaded guilty to three counts of robbery and admitted that he personally used a firearm during each robbery." (*Id*. at p. 1311.) The trial court imposed concurrent terms for the robbery convictions and consecutive terms for the gun-use enhancements and sentenced defendant to an aggregate term of 17 years, 4 months. (*Id*. at p. 1309.) The Court of Appeal concluded that,"[i]n separating the felony and its attendant enhancement by imposing a concurrent term for the felony conviction and a consecutive term for the enhancement[,] the court fashioned Mustafaa's sentence in an unauthorized manner under the sentencing procedure." (*Id*. at p. 1311.) Therefore, the matter was remanded for resentencing. In what arguably was dicta,[3] the court stated that the rule against double jeopardy barred a more severe sentence on

[3] The discussion was unnecessary for the court's holding and was apparently included to provide guidance to the trial court on remand.

remand because the original sentence was "a legal aggregate sentence, only fashion[ed] . . . in an unauthorized manner." (*Id*. at pp. 1311-1312.) The court offered no explanation for its conclusion that the trial court's "error in separating the convictions from their attendant enhancements, though unauthorized by law, [did] not make the total sentence illegal." (*Id*. at p. 1312.)

The First Division of the Fourth District Court of Appeal—the very court that issued *Mustafaa*—recently rejected the argument that *Mustafaa* stands for the proposition that where "the trial court at the original sentencing *theoretically* could have imposed" the original sentence "as an authorized sentence" means a more severe sentence on remand is unconstitutional. (*People v. Vizcarra* (2015) 236 Cal.App.4th 422, 438 [rejecting claim that seven-year increase in aggregate prison sentence following first appeal violated state double jeopardy principles where original sentence was unauthorized].)

Defendant also relies on *People v. Torres* (2008) 163 Cal.App.4th 1420, 1432 (*Torres*), which read *Serrato* narrowly as applying only where the original sentence "demonstrated legally unauthorized leniency that resulted in an aggregate sentence that fell below that authorized by law." In other words, the court in *Torres* concluded that a more severe sentence may be imposed on remand only where "correcting the illegal portion of the defendant's original sentence . . . *mandate*[*s*] the imposition of a higher sentence." (*Id*. at p. 1429, italics added.) In *Torres*, "the [original] aggregate sentence of seven years . . . could have been lawfully achieved by imposing the mid term of two years on count three plus the consecutive enhancement term of five years . . . ." (*Id*. at p. 1432.) Because the initial sentence "did not fall below the mandatory minimum sentence and was therefore not a legally unauthorized lenient sentence," the court concluded that "[p]rinciples of double jeopardy as well as the mandate of section 1170, subdivision (d) require[d] that . . . the trial court . . . not impose a sentence longer than originally imposed." (*Id*. at pp. 1432-1433.)

We decline to follow *Torres* for several reasons. First, that court's narrow reading of *Serrato* was not grounded in the language or reasoning of that or any other case. Instead, *Torres* based its reading of the *Serrato* exception on the mere coincidence that in *Serrato* and the hand full of other cases the *Torres* court examined, "the defendant either received a sentence equal or lesser than his original sentence, or received a greater sentence only when the court's sentence demonstrated legally unauthorized leniency that resulted in an aggregate sentence that fell below that authorized by law." (*Torres*, *supra*, 163 Cal.App.4th at p. 1432.) But that was not true of *Duran*, a case *Torres* did not discuss. Second, *Torres* relied heavily on *Mustafaa*, which we find unpersuasive for the reasons set forth above. Third, *Torres* ignored the fact that the rationale underlying the *Henderson* rule—namely, that "the risk of a more severe punishment" following appeal has a "chilling effect on the right to appeal" —was not implicated.[4] (*Hanson*, *supra*, 23 Cal.4th at p. 366; see *Massengale*, *supra*, 10 Cal.App.3d at p. 693 ["[t]he rationale of [*Henderson*], forbidding increased punishment after a reversal and second trial, does not apply" to the correction of unauthorized sentences, which must be corrected whenever discovered].) Finally, because *Torres* involved a recall of the original sentence by the trial judge, section 1170, subdivision (d) required that the new sentence be no greater than the initial sentence. (*Torres*, *supra*, at p. 1429.)

B. Due Process

Alternatively, defendant argues that the increased sentence was vindictive in violation of his federal due process rights. That claim lacks merit.

1. Legal Principles

The Due Process Clause of the Fourteenth Amendment requires both "that vindictiveness against a defendant for having successfully attacked his first

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[4] In *Torres*, there had been no appeal from the original judgment; the Department of Corrections had notified the trial court that the original sentence was illegal, and the court recalled the sentence. (*Torres*, *supra*, 163 Cal.App.4th at p. 1427.)

conviction . . . play no part in the sentence he receives after a new trial" and "that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." (*North Carolina v. Pearce* (1969) 395 U.S. 711, 725, overruled on other grounds in *Alabama v. Smith* (1989) 490 U.S. 794 (*Smith*).) "To prevent actual vindictiveness from entering into a decision and allay any fear on the part of a defendant that an increased sentence is in fact that the product of vindictiveness, the [*Pearce*] Court fashioned . . . a 'prophylactic rule,' [citation], that 'whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.' [Citation.]" (*Wasman v. United States* (1984) 468 U.S. 559, 564-565.) "This rule has been read to '[apply] a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence.' [Citation.]" (*Id.* at p. 565.)

"While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension," the United States Supreme Court subsequently "made clear that its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.' [Citation.]" (*Smith, supra,* 490 U.S. at p. 799.) Rather, it applies only where "there is a 'reasonable likelihood,' [citation], that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, [citation]." (*Id.* at pp. 799-800.)

2. Analysis

The Attorney General argues that defendant forfeited any due process claim by failing to raise it below. Defendant disputes that position and, alternatively, contends that his trial counsel rendered ineffective assistance by failing to preserve the issue for appeal. We need not decide the forfeiture issue, because even assuming without deciding that the claim was properly preserved for appellate review, it fails on the merits.

Numerous federal courts have rejected due process challenges to increased sentences where the complained-of higher sentence was imposed to correct a legal error in the original sentence. In *United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 487 (*Garcia-Guizar*), "the district court on resentencing corrected an error in the method of calculating the amount of drugs establishing Garcia's base offense level at his original sentencing, with the result that Garcia's new sentence was 33 months longer than his original sentence." Noting that "Garcia's higher sentence resulted solely from the district court's correction of an error in Garcia's first presentence report, an error the district court was obligated to correct," the Ninth Circuit found no reasonable likelihood that the increase in sentence was the product of actual vindictiveness. (*Id*. at p. 489.) Accordingly, the court declined to apply a presumption of vindictiveness.

In *United States v. Medley* (10th Cir. 2007) 476 F.3d 835, 836 (*Medley*), the Tenth Circuit found "no basis for a presumption of vindictiveness" where the complained-of sentence increase resulted from the correction of errors in the original sentencing range calculation.[5] Alternatively, the court concluded that if it were "to impose a presumption of vindictiveness, the presumption was clearly rebutted by the [district court's] explanation for [its] changes in the Guidelines calculation." (*Id*. at p. 840.) *Medley* relied on *United States v. Rourke* (10th Cir. 1992) 984 F.2d 1063, another Tenth Circuit decision rejecting a claim of vindictive resentencing where the defendant's sentence was increased to correct prior errors. (*Id*. at p. 1066 ["the sentence was increased to correct an inadvertent omission and to comply with the statutory mandate"].)

[5] The district court initially applied the 2001 version of the Federal Sentencing Guidelines. (*Medley, supra,* 476 F.3d at p. 835.) On resentencing, the court used the 2000 version, as the defendant had argued it should in her original appeal. (*Ibid.*) In addition, on remand, "the court correctly applied some Guidelines provisions that had been mistakenly omitted or misapplied at the initial sentencing . . . ." (*Id.* at pp. 835-836, fn. omitted.)

The Eighth and D.C. Circuits have held that " '[t]here is no indication of vindictiveness in resentencing a defendant to exactly the sentence that the defendant would have received but for the erroneous application of' " law by the court at the initial sentencing. (*United States v. Edwards* (8th Cir. 2000) 225 F.3d 991, 993 [original 650-month sentence increased to a life sentence following vacatur of conviction and imposition of sentencing enhancement that was applicable only absent that conviction]; *United States v. Morris* (D.C. Cir. 1997) 116 F.3d 501, 506 [approving increased sentences on drug charges after convictions for using a firearm were vacated and sentencing enhancements for possession of firearm during drug offense—which was applicable only absent the vacated convictions—were imposed].)

The Eleventh Circuit has declined to "attribute the correct application of [the Federal Sentencing Guidelines] at resentencing to vindictiveness" merely because the court incorrectly applied those Guidelines at the original sentencing. (*United States v. Ramos* (11th Cir. 2005) 130 Fed.Appx. 415, 421-422 [affirming increases in defendants' sentences from 147 months to 180 months].)

Here, the court increased defendant's sentence to correct a prior legal error—the application of the incorrect version of the governing statute to two of the counts. Federal case law supports the conclusion that no reasonable likelihood exists that the increase in sentence was the product of actual vindictiveness. (*Garcia-Guizar, supra*, 234 F.3d at p. 489; *Medley, supra,* 476 F.3d at pp. 835-836.) But even assuming that such a likelihood exists, the resulting presumption of vindictiveness is rebutted here. The trial court explained that the initial sentence was based on its view that the middle term—and not the mitigated or aggravated term—was appropriate on each count, combined with its misunderstanding as to when the legislation changing the applicable sentencing triad took effect. The trial judge explained: "had I been aware that the change to the law had taken place on the dates that Counts 3 and 4 covered, I would have sentenced the defendant back then to 8 years as to each of those counts. It's just absolutely what I would have

done." The court discussed the aggravating and mitigating factors and its continued view that the middle term sentence was appropriate on each count. The court's explanation rebutted any presumption of vindictiveness. (See *Medley*, *supra*, 476 F.3d at p. 840.)

III. DISPOSITION

The judgment is affirmed.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

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